EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Antonio**

Respondent: **GCH (South) Limited t/a Hillside Nursing Home**

Heard at: **East London Hearing Centre**

On: **26 July 2021**

Before: **Employment Judge Gardiner**

Representation

Claimant: In person

Respondent: Miss L Hatch (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The complaint of unauthorised deduction from wages, under Section 13 Employment Rights Act 1996, is not well founded and accordingly is dismissed.**

2. **The Claimant is entitled to the sum of £659.20 gross for accrued but untaken holiday as at the date on which her employment contract ended, pursuant to Regulation 30 of the Working Time Regulations 1998.**

REASONS

Introduction

1. The Claimant was employed by the Respondent from 28 October 2018 until she resigned on 11 July 2020, with immediate effect. Initially she was employed as a Kitchen Care Assistant, and latterly as the Chef at the Hillside Nursing Home.

2. It is agreed the Claimant was not paid from 4 January 2020 until the end of her employment. She claims that the failure to pay her was an unauthorised deduction from her wages. In these proceedings she claims the pay that she believes she should have received during that period. In addition, she brings a claim for the accrued but untaken holiday by the time her employment ended. The Respondent accepts that 64 hours of holiday had accrued and is due to the Claimant, and this was agreed by the Claimant. It disputes that the Claimant is entitled to any further sum by way of arrears of pay.

3. This hearing took place on 26 July 2021. It was listed for half a day, starting at 10am. The Claimant joined the hearing at 10.35am. Evidence was heard until about 1.45pm.

4. In advance of the hearing, Skeleton Submissions were sent to the Tribunal on behalf of the Respondent, drafted by Miss Hatch, the Respondent's counsel. There was a bundle of documents in a hearing bundle which was 169 pages long. The Claimant suggested that there were further documents which had not been included in the bundle, saying she had thought that the hearing was starting at 3pm. As a result, she was given the opportunity to provide further documents after the end of the hearing. No further documents were provided.

5. The Claimant gave her evidence and was questioned by Ms Hatch. The Respondent called two witnesses – Maribelle Law, who was the home manager, and by Erika Hlboka, HR Business Partner. Each were questioned by the Claimant. At the conclusion of the evidence, it was about 1.45pm. There was insufficient time for submissions, and the Claimant said she considered that there were important documents on which she wanted to rely. Accordingly, I directed that the Claimant had until 9 August 2021 to summarise her case and to produce any further documents. She did not provide any further documents or submissions. I had given the Respondent until 25 August 2021 to respond in writing. In circumstances where there had been no further submissions from the Claimant and the Respondent had set its case out fully in the Skeleton Submissions, the Respondent confirmed to the Tribunal on 9 September 2021 that it would not be putting in any further submissions.

Findings of fact

6. When the Claimant started work, she was issued with a Statement of Main Terms and Conditions of Employment. She signed this document on 9 November 2018, confirming that she agreed to the terms it contained. Clause 4 described her Job Title as Kitchen Care Assistant, adding: "The Company reserves the right to require you to perform other duties and work in other departments from time to time, dependant on the needs of the business and your skills, and it is a condition of your employment that you are prepared to do this". She was expected to work a 30-hour week, subject to a three month probationary period, but told that "if your performance is assessed as being unsatisfactory by the end of the probation period, your probation may be extended or your employment terminated".

7. The contract set out her Holiday Entitlement describing the holiday year as beginning on 19 April and ending on 18 March of the following year. The Respondent's evidence, which I accept, is that this was a typographical error, which should have recorded that the holiday year began on 19 March and ended on 18 March of the following year. It stated, in clause 7.5, that "holiday entitlement unused at the end of the holiday year cannot be carried over into the next holiday year and is therefore lost". Clause 7.7 recorded that "if you leave [the Respondent], payment will be made in respect of any accrued holiday entitlement which has arisen, on a pro rata basis, but has not been taken at the date of termination. Equally, you may have a deduction made for any excess of holiday entitlement already taken at the date of leaving".

8. In relation to sickness absence, clause 8.1 provided that the Claimant was entitled to Statutory Sick Pay (SSP) during periods of sickness absence. It also stated that "Any payment over and above SSP will be made at the absolute discretion of the Company. SSP will only be paid on the 4th day of absence". Clause 8.2 recorded that further rules were contained in the Sickness Absence Policy. That Policy has not been provided.

9. The contract of employment did not contain a particular term entitling the Respondent to suspend the Claimant without pay for specified reasons.

10. On 10 January 2019, the Claimant was sent a letter noted that the Claimant had agreed to the following changes to her terms and conditions – her role would now be that of Chef on a salary of £10 per hour, based at the Hillside Nursing Home, working a total of 36 hours per week. "All other terms and conditions remain unchanged as per your contract of employment". The Claimant signed to confirm her acceptance of these changes to her terms and conditions.

11. The Job Description for the role of Chef, set out the Objectives of the role in several bullet points. These included:

- To conduct all procedures within the kitchen with due regard to the food hygiene, Health and Safety legislation, Emergency and Fire Procedures.
- Adhere to all Group policies and procedures within the defined timescales.
- Be familiar with the required care standards and regulations governing your job (primarily Standard 15, NMS)

12. Under the heading General Responsibility was the following material sentences:

> "Maintain an awareness of the Health and Safety requirements.
> To carry out additional duties as requested.
> To undertake any additional training and development programmes the Home may consider appropriate to enhance your contribution to the work at this home.

> To review on a regular basis the job description for your post and to agree any changes."

13. Under the heading Accountability, the following was written:

> "Be accountable to the Manager for all areas of your duties and responsibilities. This accountability will be expressed through:
> - Regular one to one supervisions and team meetings with the Manager and other members of the team.
> - An annual appraisal meeting at which personal targets will be set and monitored."

14. At the foot of the Job Description was the following sentence – "I have read, understood and agree to the duties and responsibilities in the job description for the post of Cook". The document then ended with a space for the signature of the postholder and the date. The document in the bundle was not signed. Nevertheless, I find that the Claimant was issued with this document. In continuing to work after accepting this document, she has agreed that the role she was performing was the role set out in the Job Description.

15. On 3 July 2019, the Home's Deputy Manager, Lovette Edora, was scheduled to hold a 1-2-1 meeting with the Claimant which recorded several areas of concern. The Claimant refused to attend the meeting and it was rescheduled for the following day, 4 July 2019. The Claimant did subsequently sign a note recording these concerns and recording that she had been issued with a Final Warning.

16. On 26 September 2019, a probationary review meeting was held to discuss the Claimant's probationary period. The record noted against Training needs if applicable – "All necessary training". The Claimant signed to confirm that this was a true record of the meeting.

17. Subsequently, on several occasions, the Claimant was told she needed to undertake further training. This included a warning given at a team meeting on 16 October 2019 that all staff had to do their mandatory training or they will face disciplinary action/suspension. The same warning was given at a meeting on 22 October 2019. The records note that the Claimant spent a day on 23 October 2019 engaged in training, for which she was paid. The subject matter covered by the training is unclear. I accept the evidence given by Ms Law that the required online training could have been carried out either from home or from work and could be accessed from a mobile phone. As with the training which had taken place on 23 October 2019, the Claimant would have been paid for doing this training.

18. At the meeting on 28 October 2019, attended by the Claimant, staff were told that "reminder letters will be sent for those who have yet to complete [their mandatory training] after which a warning letter will be sent and finally if still not done your shifts will be taken off you". The same point was made at further meetings on 30 and 31 October 2019, and 14 November 2019.

19. A letter was sent to the Claimant on 27 November 2019. This was worded as follows:

> "As a staff member of Gold Care Homes, you are required to undertake mandatory training to ensure that we not only comply with regulations and the law but also ensure that your knowledge, skills and understanding of this important area are kept up to date, enabling you to work safely, effectively and confidently."

20. The letter then listed ten areas where training was required, before concluding "If you haven't completed the mandatory training on your learning pathway, you won't be eligible for work … Failure to complete the modules online, may lead to disciplinary action". The Claimant was expected to carry out this training by accessing online courses. This was refresher training on topics on which she had been trained when she first started. I find that each training topic would have taken about 30 minutes to complete. Therefore, the total amount of time required to complete the training was about 5 hours.

21. At a staff supervision meeting with the Claimant, it was noted that she had not completed her mandatory training. She was warned she would be issued with a second warning letter if this was not completed within 7 days.

22. The Claimant was sent a further letter on 19 December 2019 which listed the same ten areas where training was required. The letter stated: "as you are aware all staff working in the care industry are expected to do their mandatory to be compliant". The Claimant was warned that "if you haven't completed the mandatory training on your learning pathway, you won't be eligible for work from 02/01/20".

23. A further probationary review meeting was held on 23 December 2019. Under the heading 'Training needs if applicable', the record stated:

> "2nd letter was given and need to pay urgent attention. 7 days given to complete all mandatory training and if this is not done, Leah as to be taken out from the rota until all mandatory training is completed"

24. The Claimant signed this meeting record acknowledging that this was a true record of the meeting.

25. The Claimant did not carry out any of the required training by 2 January 2020. On 3 January 2020, Ms Law emailed to the Claimant at 23:04. Her email noted that she had attempted to contact the Claimant several times by telephone but been unable to do so. The email stated that:

> "the mandatory training remains outstanding and you have received written warnings about this previously. In such an instance, it means you are not compliant and are thus not permitted to work. Therefore, I must advise that you are suspended from duties with immediate effect. Please do not turn up for your scheduled shift tomorrow (Saturday 4th January 2020). You must complete this mandatory training as quickly as possible so that you can return

to work. Please contact me if you have any queries or to confirm that the training has been completed"

26. The Claimant responded with a very long message complaining about the way she had been treated. The message did not make any comment about the need for training. On 4 January 16:34, Geraldine Finney stated "This has nothing whatsoever to do with the fact that you have not completed your training. As soon as it is completed you can return to work". After another lengthy response from the Claimant, referring to way other staff had been treated, Ms Finney replied "Just do your training you have NO idea what is going on with other staff and it is none of your business. You could have completed many modules in the time you have wasted sending all these emails". On 5 January 2020, the Claimant send a response saying: "I will go to [Ms Law] so I can access that training password tomorrow".

27. The Claimant's case at the Final Hearing was that she did all the training she was required to do after she had been suspended. She says she had finished the training by 9 January 2020. Later in her oral evidence she said she had completed five of the ten modules. I am unable to accept either version of events. They are not supported by any emails or messages sent at the time. The suggestion that the Claimant had completed her training on 9 January 2020 is inconsistent with the Claimant's messages sent on 13 January 2020 and on 6 February 2020, which I deal with below. It is also not a point made on her ET1 Claim Form or during the case management discussion at the Preliminary Hearing. I find that the Claimant did not complete any of the required training. Had she completed the online training, this would have generated a message which would have been sent to the Respondent confirming that the Claimant had successfully completed a particular module. I accept the evidence from the Respondent that they never received such a message. That is why no such records exist in the Hearing bundle.

28. On 13 January 2020, the Claimant was sent a letter inviting her to a performance review hearing on 17 January 2020, to discuss "concerns regarding your poor attendance". The Claimant responded that she was unable to attend this meeting as she had an important meeting to attend to. The Claimant also messaged on 13 January 2020 about the required training saying that "I just want to finish the training but I'm having a hardtime accessing it online so need to go there and see Lynda, really wanted to come today but for almost 2 weeks now I'm suffering palpitation and restraining me from going outside lately". The Claimant had not sent in a sicknote confirming she was unfit for work. The Claimant was offered an alternative day for the performance review meeting of 16 January 2020. It was subsequently rescheduled on several further occasions. It is unclear whether it actually took place.

29. On 6 February 2020, the Claimant emailed Ms Law referring to her latest state of health, which she noted as preventing her from working due to the extent of her stress, for which she was seeking medical attention. It was unclear when any such health condition started. Again, she did not provide any medical certificates confirming she was too ill to work. Regarding the position on training, she wrote "please check the progress of my training, its taking me longer as I can't stay long on

my phone or computer as it makes me feel sick and more dizzy". Absences from 19 March 2020 onwards were recorded as AWOL – absent without leave – other than one day on 14 April 2020 where the reason for absence was recorded as "sick". This is because the Claimant had emailed the Respondent on 13 April 2020 recording that she was not able to attend work the following day due to a fever. I reject the Claimant's evidence that she provided the Respondent with a Fit Note in early March 2020.

30. On 9 April 2020, Ms Law wrote to the Claimant. The letter listed ten areas where training was still required. It stated that "you can return to work and we will allow you 1 hour per day to complete the mandatory training whilst at work. You will need to complete this training within 5 working days. Whilst you're completing your training, your role will be of a kitchen assistant. As a Chef, you will ned to have successfully completed your mandatory training. Please note that this training needs to be completed by no later than Tuesday 21 April 2020. Failure to do so may impact your employment with the company. Please let me know if you want to make any changes to the date and time of your completion of training."

31. On 10 April 2020, the Claimant was instructed to report on 14 April 2020. She was told that she "needed to report at 09:00 for you to start your mandatory training. Please note that we have allocated 1 hours for you for every time you are in". On 13 April 2020, the Claimant replied that she was unable to make it tomorrow "as I am self-isolating due fever". She was asked to provide her 111 self-isolation form.

32. On 29 May 2020, the Respondent emailed the Claimant noting that she had failed to report for work on 15 April 2020 and no explanation had been provided for her non-attendance. It recorded, and I accept, that the Respondent had attempted to contact the Claimant to discuss the matter and had left messages.

33. I find that the Claimant and Roma Ramsurn, HR Business Partner, spoke by telephone on 3 June 2020. During the conversation, the Claimant told Ms Ramsurn that she would be attending her GP surgery to obtain a sick note. Ms Ramsurn followed up on the conversation with an email in which she asked for confirmation from the Claimant as to whether she had been able to speak to her doctors for the sick note. She added "Please note that your absence at present is not authorised therefore it is AWOL."

34. On 5 June 2020, Ms Roma Ramsurn reiterated in an email that the Claimant was on unauthorised absence. She said that she would need something from the Claimant to support her absence.

35. Rather than provide a sicknote, on 9 June 2020, the Claimant wrote "I'm finishing off my resignation today and will send it tomorrow or on Thursday, but still I'm just waiting for my sicknote letter to be sent by post and some of my records in my GP".

36. On 11 June 2020, Ms Ramsurn wrote to the Claimant that she will need to start the disciplinary process as AWOL is unauthorised absence. There appears then to have

been no further correspondence for a month, until 11 July 2020, the Claimant emailed the Respondent as follows:

> "To whom it may concern
> Through this letter, I hereby announce my resignation from the post of Head Chef for Hillside Nursing Home under Gold Care Home.
> It has been pleasure working with you and the entire Hillside Nursing Home staff for the past years in my time there. I would like to take this opportunity to wish the company good fortune in the future and appreciate the opportunity the Hillside Nursing Home has given me"

37. On 13 July 2020, the Respondent wrote to the Claimant acknowledging receipt of the Claimant's letter of resignation. It confirmed that the Claimant's last date of service was 11 July 2020. It indicated that there would be a deduction for "overtaken holidays" but did not set out any calculation in this respect.

Claimant's case

38. The Claimant's case, as recorded in the Case Management Order on page 34 of the Hearing Bundle, is as follows:

    a. She alleges she was told by her line manager that she had to do the training at home on her day off but could not do so as she had 4 children and a busy home life;

    b. She alleges she understood that if the training was necessary for her job she should have been allowed to do it during working hours;

    c. She alleges that she wanted to do the training at work but was not allowed to do so;

    d. She alleges that her suspension was not within the terms of the contract and she should have been paid;

    e. She had not received any sick pay or statutory sick pay for the period she was unwell.

Respondent's case

39. The Respondent's case is that there were two distinct periods of absence. The first was from 4 January 2020 to 5 March 2020 when the Claimant was suspended due to her failure to complete her training. The second was from 6 March 2020 when the Claimant was recorded as absent without leave.

40. The Respondent contends that the Claimant was not ready willing and able to work at any point from 4 January 2020 onwards, in respect of both periods of employment, because she had failed to carry out her mandatory training. The Respondent has referred to the cases of *Burns v Santander* [2011] IRLR 639; *North West Anglia NHS*

Foundation Trust v Gregg [2019] IRLR 570; and *Edwards v Secretary of State for Justice* UKEAT/0123/14 (24 July 2014), as set out in the Skeleton Submissions.

Relevant legal principles

41. Section 13(3) of the Employment Rights Act 1996 provides that an unauthorised deduction will occur where the total amount of wages paid to the employee by the employer on a particular occasion is less than the total amount of wages "properly payable" to the employee on that occasion. If an employee does not work during periods when she is not paid, she must show that she was "ready, willing and able to" perform that work.

42. The work that the Claimant must be "ready, willing and able to do" is the work that the employer is entitled to expect the Claimant to do, consistent with the terms of the contract and the scope of any applicable Job Description. If the Claimant is refusing to do a part of the job role that the Respondent is requiring the Claimant to carry out, then the Claimant is not still entitled to payment.

43. The cases referred to by the Respondent are applications of this general principle on the facts of particular cases.

44. Section 151(1) Social Security Contributions and Benefits Act 1992 provides:

> "Where an employee has a day of incapacity for work in relation to his contract of service, that employer shall, if the conditions set out in sections 152 to 154 below are satisfied, be liable to make him, in accordance with the following provisions of this Act, a payment (to be known as "statutory sick pay") in respect of that day."

45. Section 156 of the same Act provides as follows:

> (1) Regulations shall prescribe the manner in which, and the time within which, notice of any day of incapacity for work is to be given by or on behalf of an employee to his employer.
>
> (2) An employer who would, apart from this section, be liable to pay an amount of statutory sick pay to an employee in respect of a qualifying day (the "day in question") shall be entitled to withhold payment of that amount if—
>
> (a) the day in question is one in respect of which he has not been duly notified in accordance with regulations under subsection (1) above; or
>
> (b) he has not been so notified in respect of any of the first three qualifying days in a period of entitlement (a "waiting day") and the day in question is the first qualifying day in that period of entitlement in respect of which the employer is not entitled to withhold payment—

(i) by virtue of paragraph (a) above; or

(ii) in respect of an earlier waiting day by virtue of this paragraph.

46. So far as is material to this case, Regulation 7 of the Statutory Sick Pay (General) Regulations 1992 provides that notice of any day of incapacity for work shall be given by or on behalf of any employee to his employer on or before the seventh day after that day of incapacity for work. Notice of any day of incapacity for work may be given one month later where there is good cause for giving it later or if in the particular circumstances that is not practicable, as soon as it is reasonably practicable thereafter, but must in any event be given on or before the 91st day after that day. Where, as here, the employer has not decided on a manner in which notice should be given, then it may be given in any manner, but shall be given in writing.

47. If the employee fails to notify the employer within the relevant time frame and the employer does not accept that there was a good reason for the delay, the employer is entitled to withhold payment of SSP for the duration of the delay: Section 156(2) Social Security Contributions and Benefits Act 1992.

48. Statutory sick pay is not paid for the first three qualifying days in any 'period of incapacity for work' (Section 155(1) SSCBA1992).

Conclusions

Unauthorised deduction from wages

49. The Respondent made it abundantly clear to the Claimant from September 2019 onwards that she was required to carry out the specified mandatory training. The Claimant did not carry out the mandatory training and did not provide an adequate explanation for this failure. I do not accept the Claimant's contention she was told by her line manager she had to do the training at home on her day off but could not do so as she had 4 children and a busy home life. That contention is not supported by any of the messages or emails at the time. Had that been the Respondent's stance, the Claimant is likely to have complained about it in her messages to the Respondent. Just as training in October had been paid, I find that the Respondent would have paid the Claimant for completing the required training and this could have been done either at home or at work. The Claimant refused to carry out the training.

50. In those circumstances, consistent with the terms of the employment contract and the Job Description, the Respondent was entitled to require the Claimant to complete the training. It is an implied term of an employment contract that an employee will comply with reasonable instructions provided by their line manager. It was reasonable to expect the Claimant, even when engaged as a Chef, to undertake the required refresher training on these topics.

51. It was an Objective that the Claimant would conduct all procedures within the kitchen with due regard to the Food Hygiene & Health and Safety legislation; and that the

Claimant would adhere to all Group policies and procedures within the defined timescales. It was the Respondent's policy that all staff should complete their refresher training by the specified deadline. The Claimant's General Responsibility was to "carry out any additional duties as requested"; and to "undertake any additional training and development programmes the Home may consider appropriate to enhance your contribution to the work at this home.". The nominated training was considered appropriate for the Claimant.

52. Further, given the Claimant's persistent refusal to carry out the training, the Respondent was entitled to specify to the Claimant a deadline by which the Respondent would refuse to provide the Claimant with work if she continued to refuse to carry out the required training. That is what was done here. It was not necessary for there to be an express clause in the contract permitting the Respondent to suspend the Claimant without notice, in order for the Respondent to be entitled to refuse to provide the Claimant with work in these circumstances. The Claimant was not ready willing and able to carry out the specific requirements of the role she was employed to perform, which required her to undergo training when directed to do so by the Respondent. Therefore, there was no obligation on the Respondent to provide the Claimant with work.

53. This was the position from 4 January 2020 until 9 April 2020. It remained the position from that date onwards when the Respondent agreed that the Claimant could work as a Kitchen Care Assistant for a week, carrying out one hour of training each day over five days so that the training could be completed. The Claimant was not ready, willing and able to carry out these revised duties during that week in accordance with the Respondent's instructions.

54. The Claimant has asserted she was ill and incapable of working, and so was entitled to statutory sick pay. However, the onus is on her to both to prove she was not capable of work, and that she provided the notification required under the relevant statutory sick pay regulations. There is no medical evidence in the bundle establishing that that Claimant was unwell to the extent that she was unable to work for a period in excess of three working days, and therefore potentially entitled to statutory sick pay from the fourth day. I do not regard the Claimant's occasional references to her state of health in contemporaneous emails as sufficient evidence to establish an entitlement to statutory sick pay. It is telling that the Claimant did not provide the Respondent with any fit notes or self-certification forms during the relevant period. Nor did the Claimant provide a self-isolation certificate when she advised the Respondent she was self-isolating. The Claimant has provided no medical evidence as part of her tribunal claim to justify her entitlement to statutory sick pay.

55. Therefore, the Claimant's claim for unauthorised deduction from wages fails.

Holiday pay

56. So far as the claim for accrued but unpaid holiday pay is concerned, the parties agree that the Claimant is entitled to 64 hours pay. At this time, the Claimant's hourly rate was £10.30 per hour. Therefore, the Claimant is awarded £659.20 by way of accrued holiday pay.

Employment Judge Gardiner

15 October 2021